

FILED 08 SEP 23 11:40 2008 USDC-ORE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PHILLIP LEE KEPHART,

Petitioner, Civil No. 08-65-TC

v.

FINDINGS AND
RECOMMENDATION

BRIAN BELLEQUE,

Respondent.

COFFIN, Magistrate Judge.

Petitioner filed a petition under 28 U.S.C. § 2254 challenging his convictions from Lane County Circuit Court cases 10-91-02674 and 10-91-03155.

Respondent filed a Response (#14) and an Answer (#15) on June 3, 2008. Petitioner's reply brief was due on August 4, 2008, but petitioner did not file a brief. This matter came

under advisement by the court on August 18, 2008.

Respondent's un-controverted Response and Answer establish that petitioner previously challenged the convictions at issue in this case in Civ. No. 01-690-CL. In that case the District Court denied the petition, but the Ninth Circuit Court of Appeals granted the petition and remanded the case to the District Court. Petitioner is represented by counsel in that pending case.

28 U.S.C. § 2244(b)(3)(A) requires petitioners to obtain permission of the Court of Appeals before filing a second or successive petition in the District Court. If a petitioner does not obtain the required certificate of authorization to file a second or successive petition, the District Court has no jurisdiction to consider the petition. Cooper v. Calderon, 274 F.3d 1270 (9th Cir. 2001).

Petitioner has not obtained the required certificate of authorization to proceed with a second petition concerning the conviction at issue in this proceeding. Accordingly, petitioner's Petition (#2) should be denied without prejudice. This proceeding should be dismissed.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice

of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have ten days from the date of service of a copy of this recommendation within which to file specific written objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issue and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 23 day of September, 2008.



Thomas M. Coffin

United States Magistrate Judge